IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No. 1913 of 2000

For Approval and Signature:

HONOURABLE MR.JUSTICE K.A.PUJ

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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DARSHANA R DAVE - Petitioner(s)

Versus

STATE OF GUJARAT, THROUGH ADDITIONAL CHIEF SECRETARY & 2 - Respondent(s)

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Appearance :

MR MS TRIVEDI for Petitioner(s) : 1,MS PRANJAL M TRIVEDI for Petitioner(s) : 1,
MR LB DABHI, AGP for Respondent(s) : 1 - 3.

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CORAM : HONOURABLE MR.JUSTICE K.A.PUJ

Date : 16/02/2006

ORAL JUDGMENT

1. The petitioner has filed this petition under Article 226 of the Constitution of India

praying for quashing and setting aside the order dated 1/3.3.1997 passed by the Director of Medical Services, Employees State Insurance Scheme, Ahmedabad on 28.2.2000 and further seeking direction to the respondents, to reinstate the petitioner in service to her original post of Staff Nurse under the Superintendent, Medical Services, Employees State Insurance Scheme, General Hospital, Bapunagar, Ahmedabad, with all back wages and all other consequential benefits including that of seniority, promotion etc. The petitioner has also prayed for quashing and setting aside the judgment and order delivered by the Gujarat Civil Services Tribunal, Gandhinagar in Appeal No.380/1997 dated 21.12.1998 and in Review Application No.1/1999 dated 30.4.1999 confirming the order of the Director of Medical Services and removing the petitioner from service.

2. It is the case of the petitioner that the petitioner was originally appointed as a Staff Nurse and posted at Bapunagar General Hospital on 27.4.1981. The petitioner was made permanent in the cadre of Staff Nurse by order dated 6.12.1989 passed by the Direct of Medical Services, Employees State Insurance Scheme, Ahmedabad. The petitioner's husband was seriously injured in a stabbing which took place during the period of riot in the city of Ahmedabad. Though the petitioner's husband recovered but he was required to take rest for long time and, thereafter, he went to Nairobi to stay with his parents. In the month of July, 1995 while the petitioner was on sick leave, she received a message about serious illness of her husband and immediately she rushed to Nairobi. In the circumstance, the petitioner has after reaching to Nairobi posted

application for extension of leave. However, while the petitioner returned to India by April, 1997, it was found that the respondent No.2 has passed order removing the petitioner from service on account of unauthorized absence from duty. On further inquiry, it came to her notice that since the petitioner was found to be on unauthorized absence from 11.7.1995, letter, reminder, show cause notice, charge-sheet etc, were issued against the petitioner for calling upon her to resume duty. However, in absence of response to the said communication, public notice was given in the local newspapers viz. Jansatta Loksatta and Young Leader dated 16.11.1996 and accordingly since she has failed to resume duty within a period of 15 days from the said notice, by passing order dated 1/3.3.1997 the petitioner was treated as relieved from the government service from 11.7.1995.

3. Since the decision of the Director of Medical Services, Employees State Insurance Scheme, Ahmedabad, to remove the petitioner from service was taken without following due procedure of law, though the said decision tantamount to imposing major punishment, the petitioner preferred an Appeal before the Civil Services Tribunal, Gandhinagar. In the said Appeal, the petitioner raised several contentions and challenged the order of removal passed by the Director of Medical Services. The Civil service Tribunal, however, came to a conclusion that since the petitioner has shown disregard to call of duty, she was not entitled for reinstatement in service. The Tribunal has held that the petitioner be treated as removed from service with effect from 3.3.1997 instead of dated 11.7.1995. The petitioner thereafter filed Review Application seeking review of the

judgment of the Tribunal in Appeal No.380/1997 and the said Review Application No.1/1999 also came to be summarily rejected by order passed by the Tribunal on 30.4.1999.

4. It is also the case of the petitioner that the petitioner could have preferred Special Civil Application before this Court after the order of review passed by the Tribunal. However, since the order of removal was passed by the Director of Medical Services, who is head of the department under the State Government and in the circumstances, remedy of representation was available to the petitioner, she made representation to the State Government including that of Hon'ble Minister of Health. The petitioner has reliably learnt that her representation was sympathetically considered by the Hon'ble Minister and specific recommendation was made to the department to

accede to the request of the petitioner. However, the respondent No.1 has passed order on 21.12.1999 whereunder representation of the petitioner was rejected and hence the present petition is filed before this Court.

5. Mr.M.S.Tribvedi, learned advocate appearing for the petitioner has submitted that the order of removal passed by the Director of Medical Services is ex facie illegal, arbitrary, discriminatory and violative of Articles 14 and 16 of the Constitution of India. He has further submitted that on perusal of letter written by the office of the Director of Medical Services dated 7.7.1997 it is evident that the Director of Medical Services has, before passing order of removal of the petitioner from service, made an attempt to serve the notice at the residential address of the petitioner and instead of taking any

effective relevant steps to inform the petitioner about the requirement of resumption of duty by the petitioner by serving communication at the address sown in the service book, mere formality has been completed by him and by taking leverage of endorsement found on the cover that the petitioner has left India, the impugned order of removal has been passed. He has further submitted that while she joined the service, she had given her address which is recorded in the service book. The said address as recorded in the service book is 814, Narsinhji ni Pole, Thenge Vado, Raipur, Ahmedabad. The said address continued unchanged in the service book till this date. He has further submitted that the petitioner does not deny the fact that while she left for Nairobi to take care of her husband, she was staying at the address where the relevant notices were served. However, the fact remains

that the petitioner left with whole family and since then the said house was locked. He has, therefore, submitted that it was obligatory on the part of the respondent authority to serve notice to the petitioner at the address recorded in the service book. He has further submitted normal expectation with regard to service of communication with any of the employee is that such service has to be effected at the address given in the service book and in the present case such expectation is a reasonable expectation for the simple reason that the notices or any communication which are alleged to have been sent were not served at the address at Ghatlodia, Ahamedabad. He has further submitted that had communication been served at the address given in the service book, the petitioner through her parents could been immediately come to know about the fact that some proceedings are initiated against her

and she could have properly responded to the said proceedings. By not addressing the communication to the petitioner at the address given by the petitioner and recorded in the service book the respondent authorities have committed illegality and irregularity and, therefore, the consequent order passed by the respondent authority is illegal, null and void and it requires to be quashed and set aside.

6. Mr.Trivedi further submitted that the Director of Medical Services has passed an order of removing the petitioner from the service on the ground that the petitioner remained unauthorizedly absent from duty from 11.7.1995 to 3.3.1997. The decision to remove the petitioner is punitive in nature and the penalty of removal of the petitioner is major penalty within the meaning of Rule-6 of the Gujarat Civil Services (Discipline & Appeal)

Rules, 1971. He has further submitted that Rule-9 of the said Rules requires to follow the procedure for imposing major penalty and the said mandatory requirement has not been complied with in case of the petitioner. He has further submitted that in the petitioner's case neither any preliminary show cause notice has been issued to her nor any charge sheet was served upon her or caused to be served upon her nor any inquiry officer was appointed nor recommendation of the inquiry officer was obtained before passing the impugned order dated 3.3.1997 removing the petitioner from service. He has further submitted that since no mandatory procedure as set out under Rule-9 of the aforesaid Rules was followed by the respondent authority, the impugned order is illegal, null and void and, therefore, it deserves to be quashed and set aside.

7. Mr.Trivedi has further submitted that the Director of Medical Services, has before arriving at the decision to impose penalty of removal from the service, has not served or caused to be served report of the inquiry officer upon the petitioner. He has, therefore, submitted that the impugned order having been passed without following the principle of natural justice as envisaged in the ratio laid down by the Hon'ble Supreme Court in the case of Mahammad Ramzankhan, the impugned order is illegal, null and void and it requires to be quashed and set aside.

8. Mr.Trivedi has further submitted that the petitioner was not available on duty from 11.7.1995 till 3.3.1997, the date on which the impugned order was passed by the respondent authority. He has submitted that in view of the fact that the petitioner has put in service

since 1981, large number of leave entitlement under different category of earned leave, half pay leave, special leave etc, was accumulated and the said leave account is required to be kept by the respondent authority in her service book. The petitioner has requested by writing letter addressed to the Director of Medical Services to supply copy of the service book but the said copy has not been supplied to the petitioner. It is further submitted that the Director of Medical Services was required to consider balance of leave available on service record of the petitioner before taking any decision to arrive at any conclusion that the petitioner is liable to penalty of removal from service. He has further submitted that if the said leave account could have been taken into consideration, the question of arriving at conclusion that the petitioner has abandoned service could not have taken place and the

period during which the petitioner was not present in service could have been adjusted against available leave balance and for the short-fall thereof against leave without pay. He has, therefore, submitted that since the relevant consideration was not looked into by the respondent authority, before taking impugned decision of removal of the petitioner from the service, the order deserves to be quashed and set aside.

9. Mr.Trivedi has further submitted that while considering the appeal filed by the petitioner the Gujarat Civil Services Tribunal has committed substantial error of law relating to jurisdiction by not considering and deciding relevant factors urged by the petitioner in the appeal proceedings. He has further submitted that the Tribunal has applied ratio of the judgments of the Hon'ble Supreme Court in the

case of Dr. (Mrs.) Shashi Chaudhary vs. State of J & K, 1969 SLR 236 (SC-2) and in the case of R.Jeevaratnam vs. The State of Madras, 1967 SLR 657 (SC-3) which cannot be applied in the facts of the case of the petitioner and has ignored the judgment of the Hon'ble Supreme Court in the case of Union of India vs. D.S.Kharekar, 1998 II LLJ 748, which can be said to be covering the case of the petitioner. He has further submitted that the Tribunal has seriously erred in giving finding that the petitioner has misdirected by suddenly withdrawing her from duty and thereupon applying ratio of judgment delivered by this Court in the case of Pushpaben G. Patel vs. Secretary, 1998(1) GCD 745, though in the facts of the case, the said ratio can never be applicable in the present set of facts. The Tribunal has not considered the question with regard to the legality and validity of the

order of removal passed by the Director of Medical Services inspite of the fact that the Hon'ble Supreme Court's judgment was cited before the Tribunal. He has, therefore, submitted that the Tribunal has erroneously confirmed the order of removal of the petitioner from service. He has further submitted that the petitioner has filed Review Application so as to obtain finding on all the issues raised by the petitioner in appeal proceedings. However, the said Review Application has also been summarily rejected by the Tribunal. He has, therefore, submitted that since the Tribunal has committed an error apparent on the face of record in confirming the order of removal passed by the Director of Medical Services and order passed by the Tribunal in Appeal as also in Review Application requires to be quashed and set aside so far as and to the extent it confirms

the decision of the Director of Medical Services removing the petitioner from service.

10. Mr.Trivedi has further submitted that after the decision of the Tribunal, the petitioner has initially resorted remedy available to her by making representation to the State Government since the order of removal was passed by the Director of Medical Services and in the said representation the petitioner has narrated all the facts and reasons for which she could not remain present on duty. He has further submitted that as per information of the petitioner, the Hon'ble Minister of the concerned Department has recommended reconsideration of the case of the petitioner and reinstate her in service. However, the Additional Chief Secretary to the State Government has, without considering the application of the petitioner in true

perspective, mechanically rejected the representation made by the petitioner and communicated the said decision to the Director of Medical Services, who has in turn informed the petitioner. He has further submitted that the Review Application filed by the petitioner for reconsideration of her case was rejected without passing any speaking order and it was passed mechanically and without application of mind. He has, therefore, submitted that the said decision requires to be quashed and set aside.

11. Mr.L.B.Dabhi, learned AGP appearing for the respondent has submitted that the petitioner vide her application dated 11.7.1995 requested for four days leave on medical ground and she has also produced medical certificate with her application. Thereafter, the petitioner did not come to office for duty. As there was no

message or information from the petitioner, the respondent department requested her to attend the office vide letters dated 9.8.1995 and 11.9.1995. Both the letters were returned with the postal remarks “Left India”. Thereafter other letters dated 19.2.1996 and 29.3.1996 were sent to the petitioner, which also returned by the postal department with the same remarks. As there was no communication from the petitioner and all the letters sent to the petitioner were returned with the aforesaid remarks, on 17.6.1996 charge sheet was sent to the petitioner's address which was also returned with the same remarks. Therefore, as a last chance before taking any departmental action against the petitioner, one more letter was sent to her address which was also returned with the same remarks. He has, therefore, submitted that the petitioner left the country and the petitioner has no interest in her

service. Still however in order to see that no prejudice is caused to the petitioner, the department published a notice in daily newspaper dated 16.11.1996, asking the petitioner to report for duty within fifteen days from the date of notice, or the department would treat her to be terminated from service. For this notice also there was no response from the petitioner. Therefore, the order dated 3.3.1997 terminating the petitioner from service was sent to her address by Registered A.D.Post, which also returned by the postal department. Therefore, on 15.4.1997 staff of the department went to her residence with a witness/panch and pasted the order dated 3.3.1995 at the doors of her residence. Thus, the petitioner was terminated from her services with effect from 11.7.1995 that is the date from which she remained absent without prior approval or sanction or even giving information

to the department.

12. Mr.Dabhi has further submitted that the petitioner has neither asked for nor obtained NOC for obtaining passport. She has not given her address to which she should be contacted during her absent period. without prior permission of the authority she left the country as it proves from the postal remarks of the returned letters addressed to the petitioner. Even newspaper notice giving her ultimatum to join duty within fifteen days from the publication of notice remained unresponsive. As per Discipline & Appeal Rules, the respondent authority was of the view that the petitioner was not interested in service and she left India. Therefore, her representation for reinstatement in service was rejected by the authority. He submitted that the main issue involved in this petition is

breach of service conditions and the action taken under Discipline & Appeal Rules applicable to the service conditions of the petitioner. Since the petitioner left country without prior permission or NOC from the department she was liable to be removed from the service. Mr.Dabhi, has, therefore, submitted that the respondent authority has rightly removed the petitioner from service and the said order of removing the petitioner was confirmed by the Gujarat Civil Service Tribunal. There being concurrent findings of facts, this Court while exercising its power under Articles 226 and 277 of the Constitution of India should not interfere in the order of removal of the petitioner.

13. In rejoinder, Mr.Trivedi has submitted that if this Court is not inclined to pass any order of reinstatement with or without back wages,

the order of removal may be converted into the order of compulsory retirement so as to enable the petitioner to claim all her retirement benefits. He has submitted that right from 1981 to 1995, the period during which the petitioner had served the respondent authority as a Staff Nurse and there was no complaint whatsoever against the petitioner. It was absolutely a blot less carrier. Because of the circumstances beyond the control of the petitioner she could not resume her duty and to that extent the petitioner may be considered as negligent. However, the charge which was levelled and said to have been proved against the petitioner was the charge of misconduct. An unauthorized overstaying or remaining unauthorizedly on leave could not be resulted into the removal of the petitioner from service and hence this Court should take sympathetic and lenient view in the matter and modify the

order of removal into compulsory retirement. Mr.Dabhi has objected to such a request, as the respondent authorities have rightly removed the petitioner from service and the said order has been confirmed by the Tribunal. He has, therefore, submitted that order of removal of the petitioner from service should not be interfered with, as looking to the gravity of charge, the punishment imposed is not disproportionate to the charge which shock the conscience of the Court.

14.After having heard the learned advocate appearing for the petitioner and the learned AGP appearing for the respondents and after having gone through the order passed by the Gujarat Civil Service Tribunal, Gandhinagar and after having considered the authorities cited before the Court, the Court is of the view that there is no dispute about the fact that the

petitioner remained unauthorizedly absent between the period from March, 1995 to July, 1997. There is also no dispute about the fact that despite various notices, reminders, charge-sheet, public notice etc, the petitioner has not responded to the same. The only question which can be considered by the Court is as to whether this unauthorized leave for more than two years did amount to misconduct or not ? The respondent has proceeded on the footing that the petitioner has committed a serious misconduct, it was in violation of the orders and directions of the superior officer, amounting to insubordination and based on this conclusion, the order of removal was passed by the respondent authorities. The Civil Service Tribunal has also arrived at the same finding and confirmed the order of removal. However, there are certain issues which could have been considered by the respondent authorities as

well as the Civil Service Tribunal which have neither been properly appreciated nor were given just and proper weightage. It has come on record that all these notices, reminders, charge-sheet etc, have been issued not on the address which is given in the Service Book. It is true that the same were issued on the address at where the petitioner was staying before going on leave. However, once the notices were issued on this address and when the same have come back with an endorsement “Left India” the respondent authorities should have made another attempt to serve the petitioner on the address which is given in the service book. It is the say of the petitioner that the address given in the Service Book is her parents' address whereas after her marriage she was residing with her husband and the address on which the notices etc, were issued was her husband's address. It is only because

of sudden illness of her husband she has to rush to Nairobi and the house remained closed. If the notices were issued on the address given in the Service Book the communication might have been received by some one and through such service the petitioner could have offered her explanation in respect of those notices. The failure of the respondent authorities to issue such notices on the address given in the Service Book would not absolve the petitioner from remaining on unauthorized leave for such a long period. However, considering the question of penalty all these issues are required to be looked into. Another important aspect of the matter is that the petitioner's husband was seriously ill and because of her compelling circumstances she could not resume her duty during this period. Even the concerned Minister has also recommended to reconsider her case and take her back in the service.

15.In the above background of the matter, what should be the Court's approach ? Necessary support can certainly be derived from some of the judgments of this Court as well as of the Hon'ble Supreme Court. In the case of *D.C. Chaturvedi V/s. Union of India and Others, 1995 (6) S.C.C. 749* the Hon'ble Supreme Court has observed that High Court too can exercise power of review, which inheres in every Court, not to speak of a Court of plenary jurisdiction like a High Court. Of course, this power is not as wide as which the Supreme Court has under Article 142. That, however, is a different matter. If the power of modification of punishment/penalty were to be available to the Supreme Court only under Article 142, a very large percentage of litigants would be denied this small relief merely because they are not in a position to approach the Supreme Court,

which may, inter alia, be because of the poverty and the persons concerned. The Court has further observed that a High Court would be within its jurisdiction to modify the punishment / penalty by moulding the relief. In a case of a dismissal, Article 21 gets attracted, and, in view of the interdependence of fundamental rights, the punishment/penalty awarded has to be reasonable; and if it be unreasonable, Article 14 would be violated. If Article 14 were to be violated a High Court can take care of the same by substituting, in appropriate cases, a punishment deemed reasonable by it.

16.In the case of *R.M. Parmar V/s. Gujarat Electricity Board, Baroda, 1982 (1) G.L.R. 352* the Court has held that the matter regarding imposition of penalty on employees could not be left 'solely' to the 'discretion of the

management' even if the employee concerned is found to be guilty of the charge levelled against him, presumably because of the conditioned approach of the Disciplinary Authority with his inbuilt and inherent pro-employer anti-employee bias. That is why in obeisance to the felt needs of time it was considered necessary to entrust this most vital function to a neutral body. It is a benevolent power conferred on the Labour Court and has to be exercised in the spirit in which the provision has been enacted in order to further the intendment and purpose of the legislation, keeping aglow before the mental eye some very important dimensions of the matter. The Court while laying down such dimensions, has also enumerated the factors to be taken into consideration. The Court has made it very clear that it is not expedient in the interest of the administration to visit every employee

against whom a fault is established with the penalty of dismissal and to get rid of them. It would be counter productive to do so for it would be futile to expect to recruit employees who are so perfect that they would never commit any fault. The Court has further held that it cannot be overlooked that by and large it is because the maximum penalty is imposed and total ruination stares one in the eyes that the employee concerned is obliged to approach the Court and avail of the costly and time-consuming machinery to challenge in desperation the order passed by the Disciplinary Authority. If a lesser penalty was imposed, he might not have been obliged to make recourse to costly legal proceedings which result in loss of public time and also result in considerable hardship and misery to the employee concerned.

17.In the case of *Bhimsing Sardarsing V/s.*

District Supdt. Of Police & Ors., [1982] 23 (2) G.L.R. 410 the principles laid down in R.M. Parmar V/s. G.E.B. (Supra) were reiterated and the Court has directed the Disciplinary Authority to reinstate the petitioner without back wages and with continuity of service. The Court has further observed that it would be right and just and fair to direct that no further proceedings for the imposition of penalty should be taken and that the petitioner shall be reinstated in service and that the period from the date of his dismissal till the date of his reinstatement shall be treated as period spent under suspension by way of penalty. The petitioner will not, however, be entitled to any monetary benefit or compensation for the entire period spent under such suspension though he would be treated as having continued in service throughout without any break for all other purposes.

18.In the case of *Sattuji Babaji V/s. State of Gujarat and another, 1986 G.L.H. (U.J.) 46* the Court has observed that there are different kinds of punishments with different degrees of severity depending upon different degrees of gravity of misconduct. The Disciplinary Authority and Appellate Authority are expected to consider as to whether any lesser punishment could have served the ends of justice and of the administration and also maintenance of discipline and good conduct in the police service. The Court has also observed that even if the punishment was required to be enhanced, the punishment of removal would not necessarily be justified especially more so when the Disciplinary Authority was satisfied that the punishment of reduction in pay for two years would meet the ends of justice.

19.In Special Civil Application No. 2811 of 1985 decided on 31.01.1997. It was a case of co-delinquent against whom the Charge-sheet was issued and he was also dismissed from service. The Court has considered the entire case law on the subject and considering the facts of the case, has come to the conclusion that the penalty imposed upon the delinquent was shockingly harsh and disproportionate. The Court has further observed that whether a reasonable employer would have thrown such a person out of service. Even if the conduct of the delinquent can be considered to be such that he was not required to be continued in service, in the facts and circumstances narrated above, the order of compulsory retirement would have met the ends of justice and that would have achieved the object of keeping the delinquent out of service and at the same time, would not have deprived the

delinquent of the retiral benefits accruing after 32 years of service.

20.Similarly in Special Civil Application No.2308 of 1985 decided on 13.12.2005 this Court has observed that on the basis of the decided case law and looking to the seriousness which is attached to the order of dismissal, the Court is of the view that the dismissal order passed against the petitioner is quite disproportionate to the charge levelled against him. In his entire career of about 13 years of service, this was the only charge and that too for a particular moment. However, on that basis, it cannot be assumed that he was sleeping all the time while he was in service. At the most, it was the case of negligence. Showing such negligence, the dismissal order could not have been passed. The Court, therefore quashed and set aside the order of

dismissal and/or removal and the respondent – Corporation was directed to reinstate the petitioner within one month from the date of receipt of the writ of this Court or certified copy of the said order, whichever was earlier and the period from the date of his dismissal and/or removal till the date of his reinstatement was directed to be treated as period spent under suspension by way of penalty. It was made clear that the petitioner would not, however, be entitled to any monetary benefit or compensation for the entire period spent under such suspension though he would be treated as having continued in service throughout without any break for all other purposes.

21.Keeping the above judicial decisions in mind this Court is of the view that the order of removal is too harsh especially when under

compelling circumstances the petitioner had to remain on unauthorized leave for such a long period. It is, therefore, just and proper to convert the order of removal into the order of compulsory retirement so as to enable the petitioner to get her retirement benefits. Even otherwise, Mr.Trivedi has made an alternative submission that in case the Court is not inclined to quash the removal order the said order may be converted into the order of compulsory retirement and accordingly the Court directs the respondents to treat the removal of the petitioner from service as the compulsory retirement of the petitioner from service. It is, however, made clear that the petitioner should be entitled to avail the benefit of the leaves which were available to her credit and only after all such leaves are exhausted, the petitioner shall be treated as compulsorily retired from service. The respondent

authorities shall grant to the petitioner all retirement benefits accrued to her as a result of this order and in accordance with law.

22.Subject to the aforesaid directions the petition is accordingly disposed off. Rule is made absolute to the aforesaid extent without any order as to cost.

(K. A. PUJ, J.)

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